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No. 101044

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In The Supreme Court of the United States

ED STRICKLAND and
NORTHLAKE MARINE WORKS,
a Washington corporation,

Petitioners,

v.

CITY OF SEATTLE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can government secure immunity from the restrictions of the First Amendment by purporting to engage in "government speech" if government both compels a private citizen to compose and distribute the speech and simultaneously refuses to permit the citizen to identify government as the speaker?

2. When government, as a condition of granting a land use permit, requires a citizen to compose and disseminate a governmental message without allowing him to identify it as government speech, does that violate the citizen's First Amendment right not to speak?

3. When government compels a citizen to compose and disseminate written material identifying sound environmental practices for the protection of water quality and yet simultaneously forbids the citizen from including any mention of government's role as the major contributor to marine pollution, has government engaged in either content or viewpoint discrimination which violates the First Amendment, either by silencing a disfavored viewpoint, or by attempting to dictate what topics are appropriate for discussion?

PARTIES TO THE PROCEEDINGS

The Petitioners are Ed Strickland and his corporation Northlake Marine Works, Inc. Strickland owns and operates a marina on the shores of Lake Union in Seattle, Washington. The Respondent City of Seattle is the largest city in the State of Washington.

CORPORATE DISCLOSURE STATEMENT OF NORTHLAKE MARINE WORKS, INC. IN COMPLIANCE WITH RULE 29(6)

I certify that there is no parent corporation for Northlake Marine Works, Inc. and that there is no publicly held corporation which owns at least 10% of its stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
INTRODUCTION TO ARGUMENT	11
REASONS FOR GRANTING THE WRIT	13
I. The Decision Below Is in Conflict With *Pleasant Grove City* and Stands the Government Speech Rationale of that Case on its Head by Compelling the Property Owner to Associate Himself With an Unwanted Message	13
II. The Decision Below Raises the Important Issue of Compelled Speech Which Was Not Presented by the Record in the *Johanns* Case	15
III. The Decision Below Conflicts With this Court's Decision in *Wooley v. Maynard*	17

TABLE OF CONTENTS – Continued

Page

IV. The Decision Below Raises the Important Issue of Whether the First Amendment Permits Government to Secure Immunity From First Amendment Scrutiny by Forcing Private Parties to Disseminate "Government Speech," While Simultaneously Hiding Government's Role in Sponsoring the Speech and Misleading the Public as to the Identity of the Speaker 18

V. The Decision Below Conflicts With this Court's Decisions in *Consolidated Edison* and in Several Other Cases, by Allowing Government to Decide What Topics Are "Relevant" Enough for a Citizen to Discuss 22

VI. The Decision Below Conflicts With this Court's Long Line of Decisions Which Hold that Government May Not Justify Content Discrimination by Showing that the Speaker Has Other Alternative Means of Communicating His Message 24

CONCLUSION 25

Appendix A Ninth Circuit Panel Decision ..... App. 1

Appendix B District Court Decision ..... App. 8

Appendix C Order Denying Rehearing ..... App. 22

Appendix D Deposition Excerpt ..... App. 23

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Arizona Life Coalition v. Stanton, 515 F.3d 956 (9th Cir.), *cert denied*, 129 S.Ct. 56 (2008) 20

Board of Education v. Barnette, 319 U.S. 624 (1943) 18

Chicago v. Mosley, 408 U.S. 92 (1972) 22

Consolidated Edison Co. v. Public Service Corp., 447 U.S. 530 (1980) .....*passim*

Downs v. Los Angeles Unified Sch. District, 228 F.3d 1003 (9th Cir. 2000) 10

FCC v. League of Women's Voters, 468 U.S. 364 (1984) 23

Johanns v. Livestock Marketing Association, 544 U.S. 550 (2005) .....*passim*

Lamb's Chapel v. Ctr. Moriches Union Free Sch. District, 508 U.S. 384 (1993) 23

Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) 23

Perry Education Association v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) 23

Planned Parenthood v. Rose, 361 F.3d 786 (4th Cir. 2004) 20

Pleasant Grove City v. Summum, 129 S.Ct. 1125 (2009) .....*passim*

Riley v. National Federation of the Blind, 487 U.S. 781 (1988) 18

TABLE OF AUTHORITIES – Continued

Page

Roach v. Stouffer, 560 F.3d 860 (8th Cir. 2009).....20

Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819 (1995) 23

United States v. Am. Library Ass'n, Inc., 539 U.S. 194 (2003).....10, 24

Wooley v. Maynard, 430 U.S. 705 (1977) 17

CONSTITUTIONAL PROVISIONS

United States Constitution, Amend. I .....*passim*

LAW REVIEW ARTICLES

Comment, *First Amendment Values at Serious Risk: The Government Speech Doctrine After Johanns v. Livestock Marketing Ass'n*, 55 Cath. U.L. Rev. 795 (2006).....21

Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U.L.Rev. 587 (2008).....21

R. Bezanson & W. Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1377, 1510 (2001).....21

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Ed Strickland and Northlake Marine Works, respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, which affirmed the summary judgment dismissal of petitioners' suit.

OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Ninth Circuit are reproduced as *Petition Appendix A*, and can also be found at 2010 WL 3468061. The decision of the District Court granting respondent's motion for summary judgment is reproduced as *Petition Appendix B*. The order of the Court of Appeals denying the petition for rehearing is reproduced as *Petition Appendix C*. A short deposition excerpt is reproduced as *Petition Appendix D*.

JURISDICTION

This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech. . . .

STATEMENT OF THE CASE

In August of 2003, Ed Strickland, the owner of Northlake Marine Works, a marina located on Lake Union in Seattle, Washington, applied to the City of Seattle for a Master Use Permit that would allow him to reconfigure an existing pier to accommodate larger recreational vessels. App. 9. On April 29, 2004, the City gave preliminary approval to Strickland's project. App. 9. However, the City required Strickland to meet several conditions before it would issue the required Master Use Permit. App. 9. One of those conditions was that Strickland compose, and distribute to his marina tenants, a "Best Management Practices Plan" (a "BMP" plan) which would inform his tenants as to the best ways to prevent their boats from damaging the marine environment of Lake Union. App. 9. City approval of the BMP plan was required before the City would give final approval to the pier reconfiguration project. App. 10.

In June of 2005, Strickland sent the City a proposed BMP plan in order to satisfy this condition. App. 10. Six months later, the City notified Strickland's agent in an e-mail that Strickland's BMP plan

was not adequate, and sent him a copy of the BMP plan which had been submitted to the City by the Shilshole Bay Marina. App. 10. The City directed Strickland to take "everything that is appropriate for Mr. Strickland's site and tenants" from the Shilshole BMPs and put it into Strickland's BMP plan. App. 10.

The Shilshole Bay Marina's BMP plan contained the following opening paragraph:

> The Port of Seattle and Shilshole Bay Marina are committed to preserving and enhancing the environment through proper management of all activities that occur at this facility. Given this commitment and in accordance with the Department of Ecology rules, United States Coast Guard regulations, and the Federal Clean Water Act, we have established these Best Management Practices in the hope that they will ensure the continued safekeeping of our harbor and marine environment. . . .

App. 11.

Following the City's directive to "take everything that's appropriate for Mr. Strickland's site and tenants" from the Shilshole plan, Strickland rewrote his BMP proposal to incorporate the Shilshole opening paragraph, except that he eliminated the reference to the Shilshole Bay Marina, substituted "the City of

Seattle" for "the Port of Seattle," and changed the reference to "the harbor" to "Lake Union."[1] App. 12.

But because Strickland strongly believed that the City of Seattle was *not* truly committed to preserving the marine environment, and because he wanted his marina tenants to be aware of the City's role as the largest polluter of Lake Union's waters, Strickland added a sentence to the opening paragraph of his revised BMP plan to inform his marina tenants of the City's own polluting practices. App. 12.

As rewritten to conform to the Shilshole Bay Marina model, and with the addition of the sentence regarding the City's role as a polluter, the opening paragraph to Strickland's proposed BMP plan now read as follows:

> ***The City of Seattle*** is committed to preserving and enhancing the environment through proper management of all activities that occur at this facility. Given this commitment and in accordance with the Department of Ecology rules, United States Coast Guard regulations, and the Federal Clean Water Act, ***the City have [sic] established these Best Management Practices*** in the hope that they will ensure the continued safekeeping of

---

[1] The Shilshole Bay Marina is located on Puget Sound, a saltwater body of water which is connected to the Pacific Ocean by the Strait of Juan de Fuca. Strickland's marina is located on Lake Union, a small freshwater lake that lies between Puget Sound and Lake Washington, a much larger freshwater lake.

> Lake Union. ***This is in contrast to the City's practice of dumping billions of gallons of sewage and storm water run off into Lake Union.***

App. 12 (emphasis added)

Margaret Glowacki, the city employee charged with reviewing Strickland's proposed BMP plan, objected to Strickland's revised opening paragraph for two reasons. App. 13. First, she said that the revised paragraph was unacceptable because it "did not make sense" to identify the "City of Seattle" in the BMP plan because the City was not the manager of the marina, and thus could not exercise "proper management" of Strickland's marina. App. 13. Second, the City objected to the sentence which said that the City had a practice of dumping raw sewage into Lake Union because Glowacki "did not know whether [this assertion] was true" and because if it was true "it might subject the City to liability." App. 13.

On behalf of the City, Glowacki decided to simply revise the opening paragraph. App. 13. She e-mailed Strickland's agent and said:

> I will revise it to read:
>
> ***The Northlake Marina*** is committed to preserving and enhancing the environment through proper management of all activities that occur at this facility. Given this commitment and in accordance with the Department of Ecology rules, United States Coast Guard regulations, and the Federal

> Clean Water Act, ***the Northlake Marina has established these Best Management Practices*** in the hope that they will ensure the continued safekeeping of Lake Union.

App. 13 (emphasis added).

Strickland did not want to remove his political statement regarding the City's role as a polluter of the lake. App. 13. But Glowacki refused to approve his BMP plan as long as it contained this statement, informing Strickland that she "didn't see that [statement] as relevant nor accurate. So, [she] brought that to [her supervisors'] attention. And they said, yeah, that shouldn't be in the document." App. 2.

Eventually, facing costly delays of his project, Strickland reluctantly agreed to delete the objectionable sentence. App. 13. He submitted yet another proposed BMP plan which deleted the entire opening paragraph and thus did not have the sentence regarding the City's role as a marine polluter. App. 13. This third version of a BMP plan was approved and the City eventually issued Strickland a Master Use Permit in February of 2008. App. 13.

Rather than proceed with the pier reconstruction project, Strickland filed suit against the City of Seattle in a Washington state court. The City removed the case to federal district court where both sides moved for summary judgment. On September 9, 2009, the district court granted summary judgment to the City and entered final judgment. The district court held that the BMP plan was immune from First

Amendment scrutiny because it was "government speech."

> When Strickland tried to add even one sentence to the BMP plan that the City did not approve of, the City rejected it. Strickland cannot claim that the BMP plan was his own private speech, when the government had complete control over its contents.

App. 17. Because it believed the BMP plan to be government speech, the district court ruled that the City was free to engage in content and viewpoint discrimination since the City was simply speaking for itself. App. 21.

The district court also rejected Strickland's contention that the City's requirement that he disseminate the City's BMP speech to his tenants violated his First Amendment right to remain silent. App. 19. The district court acknowledged that the BMP plan which the City eventually approved identified "Northlake Marine Works" on every page of the BMP plan, including the title page, and that it did not contain anything disclosing the fact "that the government approved it." App. 19. Nevertheless, the district court ruled:

> [T]his does not establish attribution; the title tells the reader to which marina the best management practices apply, not who is responsible for writing them. More importantly, there is no evidence indicating that Strickland could not have dispelled any notion that he might be associated with the

> City's BMP plan, perhaps by including a statement in the plan that its contents were subject to the City's approval and regulations.

App. 19.

Strickland appealed to the United States Court of Appeals for the Ninth Circuit. In a split decision, that Court affirmed the district court's decision. Relying upon *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005) and *Pleasant Grove City v. Summum*, 129 S.Ct. 1125 (2009), the majority held that the City-approved BMP plan is government speech and therefore exempt from First Amendment scrutiny. App. 3. The majority further held Strickland's compelled speech claim failed because he "has not shown that the City would have disapproved a version of the BMP plan that explained that his dissemination was required by the City and otherwise disclaimed attribution." App. 3. Finally, the majority held that Strickland's speech censorship claim failed. The majority purported to distinguish this Court's decision in *Consolidated Edison Co. v. Public Service Corp.*, 447 U.S. 530 (1980), where this Court held unconstitutional a utilities commission rule which prohibited utility companies from including political statements discussing controversial issues such as nuclear power inside the envelope in which they sent their monthly bills. App. 4. Because the City had "a duty to 'sign off' on BMP plans" before a land use permit could be issued, the majority held that "the City's interest in refusing to put its imprimatur on any plan that

contains information that is not relevant to the permit requirements is substantial," and this interest justified the City's refusal to allow inclusion within the BMP plan of any statement regarding the City's role as a major polluter of Lake Union. App. 4.

Judge Ikuta dissented. She viewed the "central question" in this case as "whether the City can deny Strickland a development permit solely because the City does not like the political commentary that Strickland included in his BMP plan." App. 5-6. Judge Ikuta maintained that according to this Court's decision in *Consolidated Edison*, "the answer to this question is no," because the City had engaged in "content-based censorship." App. 6.

Judge Ikuta disagreed with the majority's conclusion that the BMP plan was "government speech," noting that Strickland was the author of the BMP plan and the owner of the property where the plan would be distributed to his marina tenants:

> According to the majority, the City's censorship passes constitutional muster in this case because the City's control over the content of the BMP plan makes it "government speech" that can be regulated without First Amendment scrutiny. But Strickland is the author of the BMP plan, not the City, and a government agency cannot "restrict the free expression of a private party" unless the agency owns the property where the speech is made or is speaking itself, regardless of how much regulatory control the agency has

> over the private party's actions. *See Con Ed,* 447 U.S. at 539-40 & n.1; *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000). Thus, the majority's reliance on *Johanns v. Livestock Mktg. Ass'n,* 544 U.S. 550, 553 (2005) and *Pleasant Grove City v. Summum*, 129 S.Ct. 1125, 1133 (2009), which involved direct government speech and control over government property, respectively, is to no avail.

App. 6.

The City of Seattle made elimination of the offending sentence regarding the City's role as a polluter a pre-condition for issuance of the land use permit. In Judge Ikuta's view, this conduct violated the "well established" principle "that 'the government may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech.'" App. 7, quoting *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 210 (2003). In her view, "[i]n direct contradiction to this principle, the City denied Strickland a development permit until he agreed to curtail his First Amendment rights and remove his political commentary from the BMP plan." App. 7.

Petitioner Strickland sought rehearing of the panel's split decision and suggested that rehearing en banc be considered. These requests were denied by order of the panel issued on November 19, 2010. App. 22.

INTRODUCTION TO ARGUMENT

In *Johanns*, this Court carefully noted that the case before it involved the compelled subsidy of government speech, and that no claim of compelled private speech had been raised. *Johanns*, 544 U.S. at 565. This Court cautioned, however, that "[o]n some set of facts, this second theory might . . . form the basis for an as-applied challenge – if it were established" that the government's "beef advertisements were attributed to" private parties. *Id.* Because the record was "altogether silent" on the question of whether the ads might be perceived as the speech of private individuals, this Court concluded there was no occasion to address the question of whether it would violate the First Amendment to compel private parties to associate themselves with a government message that they did not wish to be associated with. *Id.* at 566-67.

Justice Thomas, in his concurring opinion, went further, and asserted that if the government's advertisements had associated their message with either private individuals or organizations, "then [they] would have a valid as-applied First Amendment challenge." *Id.* at 568 (Thomas, J., concurring).

> The Government may not, consistent with the First Amendment, associate individuals or organizations involuntarily with speech by attributing an unwanted message to them, whether or not the message is under the government's control. This principle follows not only from our cases establishing that the

> government may not compel individuals to convey messages with which they disagree, [citations], but also from our expressive-association cases, which prohibit the government from coercively associating individuals or groups with unwanted messages.

Id. at 568. Because the record in *Johanns* did "not show that the advertisements objectively associate their message with any individual," there was no such First Amendment violation. *Id.* at 568.

The case at bar, however, *is* such a case. By (1) forcing Strickland to associate himself with a message that he disagrees with (the contention that the practices of recreational boaters are a major cause of water pollution in Lake Union); (2) prohibiting him from expressing his view (that the City of Seattle is actually the major polluter of the lake); (3) requiring him to disseminate the BMP plan to his tenants (4) on his property; and (5) by rewriting the proposed plan so as to identify it as the "Northlake Marine Works Best Management Practices Plan"; the City coerced Strickland into associating himself with an unwanted message.

In addition, the City exercised censorship powers by refusing to allow Strickland to include his message that the City pollutes Lake Union because this message was "irrelevant" and because that viewpoint was disfavored by the City. This is directly contrary to this Court's holding in *Consolidated Edison* refusing "[t]o allow a government the choice of permissible subjects for public debate" because that "would be to allow

that government control over the search for truth." 447 U.S. at 538.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is in Conflict With *Pleasant Grove City* and Stands the Government Speech Rationale of that Case on its Head by Compelling the Property Owner to Associate Himself With an Unwanted Message.

When deciding whether speech is government speech or private speech, this Court has focused on whether the message would be understood as coming from the owner of the property where the message is conveyed. It was precisely because government owned the land where the message was disseminated, that this Court concluded in *Pleasant Grove City* that messages on statutes erected in public parks constitute government speech. There the plaintiff sought a court order requiring the City to accept and display the plaintiff's monument in a public park owned and managed by the City. The City had previously accepted and displayed a Ten Commandments monument donated to the City by another group. But this Court rejected the contention that the City's refusal to accept and display Summum's monument violated the First Amendment.

This Court held that the City, on its own property, had the same right as any private landowner to

refrain from expressing views that it did not wish to endorse. While "[t]here may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf," when it speaks by erecting a monument on its own land there is no such difficulty. *Pleasant Grove City*, 129 S.Ct. at 1132. In that case no one "dispute[d] the obvious proposition" that a monument built "for placement on public land constitutes government speech." *Id.*

This conclusion was driven by the undeniable fact that people necessarily infer that no property owner – and that includes a governmental property owner – would permit the display of a message on his own land if he did not approve of the message. Since it "is certainly not common for property owners to open up their property for the installation of monuments that convey a message with which they do not wish to be associated," it follows that "persons who observe donated monuments routinely – and reasonably – interpret them as conveying some message on the property owner's behalf." *Pleasant Grove City*, 129 S.Ct. at 1133. Since Pleasant Grove City owned the park, and also owned the Ten Commandments monument that it displayed there, the monument was "linked to the City's identity," and by allowing such a monument to be displayed the City's actions "unmistakably signif[ied] to all Park visitors that the City intends the monument to speak on its behalf." *Id.* at 1134-35.

In the court below, the majority's reliance on *Pleasant Grove City* actually stands the case on its

head. The case upholds the Government's right as a landowner to remain silent, and *not* to speak on its own land, because it does not wish to disseminate the message in question. The present case involves the same right of a landowner not to speak on his own land, and yet the court below relied on *Pleasant Grove City* as support for the conclusion that the landowner *could* be compelled to distribute an unwanted message on his property. *Pleasant Grove City* actually supports the opposite conclusion: Strickland, as the owner of the property, has the same right *not* to speak as the governmental landowner in *Pleasant Grove City*. As the dissenting judge noted, *Pleasant Grove City* does not support the result countenanced by the majority. App. 6.

II. The Decision Below Raises the Important Issue of Compelled Speech Which Was Not Presented by the Record in the *Johanns* Case.

Since *Johanns* was a compelled subsidy case and *not* a compelled speech case, this Court had no occasion to decide whether the governmental speech program violated the private party's First Amendment rights against compelled speech, or compelled association. Similarly, in *Pleasant Grove City* this Court's opinion states that the case did not involve any "coercion of private speech." *Pleasant Grove City*, 129 S.Ct. at 1136.

This case, however, squarely presents these issues. The district court acknowledged that if the City of Seattle compelled Strickland to associate himself with the City's BMP plan message against his wishes, this would violate his First Amendment rights. App. 18.[2] The majority opinion of the court of appeals also rejected Strickland's compelled speech contention. That opinion concluded that "The City's requirement that permit applicants draft and disseminate plans setting forth practices which marina tenants must follow to keep the marina free of pollutants does not abridge Strickland's First Amendment rights" because "[t]he BMP plan does not 'dictate a specific message.'" App. 2. And yet by requiring dissemination of such a plan to recreational boaters who moor their vessels in his marina, the City *does* dictate a specific message. It unmistakably sends the message that the practices of recreational boaters are a significant cause of pollution of the waters of Lake Union. But Strickland *disagrees with that specific message* because he believes based on news reports and his own observations that the only truly significant cause of pollution is "the City's practice of

---

[2] "Along the lines of Justice Thomas' reasoning it seems clear that if the City forced the final BMP plan to be attributed to Strickland, that would violate the First Amendment. To hold otherwise would lead to the illogical result that a government exercising some censorship over private speech violates the first amendment, while a government exercising comprehensive and total censorship escapes first amendment scrutiny altogether by transforming private speech into government speech."

dumping billions of gallons of sewage and storm water run off into Lake Union." App. 12.

III. The Decision Below Conflicts With this Court's Decision in *Wooley v. Maynard*.

The majority opinion also conflicts with this Court's decision in *Wooley v. Maynard,* 430 U.S. 705 (1977). There this Court reviewed New Hampshire's practice of prohibiting its citizens from covering up the State's motto, "Live Free or Die," which was printed on all state motor vehicle license plates. This Court reversed Wooley's conviction holding that the State could not force him to disseminate its message by using his car as a "mobile billboard." *Id.* at 715.

The majority opinion below does not discuss *Wooley*. It does state, however, that Strickland's compelled speech argument is "unpersuasive" because "Strickland has not shown that the City would have disapproved a version of the BMP plan that explained its dissemination was required by the City and otherwise disclaimed attribution." App. 3. This observation fails to distinguish *Wooley*, however, since the motorist's conviction in that case was reversed despite the fact that he never showed that New Hampshire would not have allowed him to affix a disclaimer to his bumper sticker alerting others that the message on his plate was one that he disapproved of and was being forced to display against his will. Moreover, this evades the question of whether a citizen can be forced to disseminate a governmental message he disagrees

with so long as he is given the option of posting a disclaimer next to the message which states his disagreement with it. Such a rule is also inconsistent with this Court's decisions in *Board of Education v. Barnette*, 319 U.S. 624 (1943) and *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988). In *Barnette*, this Court never suggested that students could be compelled to salute the flag so long as they were simultaneously permitted to disclaim any personal agreement with the message conveyed by the flag salute. Nor did this Court ever suggest in the *Riley* case that a State could force a charitable organization to disclose financial information about its internal operations so long as the charity was permitted to simultaneously explain that the disclosure was required by State law.

IV. The Decision Below Raises the Important Issue of Whether the First Amendment Permits Government to Secure Immunity From First Amendment Scrutiny by Forcing Private Parties to Disseminate "Government Speech," While Simultaneously Hiding Government's Role in Sponsoring the Speech and Misleading the Public as to the Identity of the Speaker.

In *Johanns,* three members of this Court expressed concern about allowing government to claim the protection of the government speech doctrine while failing to openly disclose government's role in sponsoring or directing the speech. In his dissenting

opinion joined by Justices Kennedy and Stevens, Justice Souter expressed his concern that when government conceals its authorship of speech it becomes impossible for the citizenry to hold government politically accountable through the democratic process. *Johanns*, 544 U.S. at 578.

> It means nothing that Government officials control the message if that fact is never required to be made apparent to those who get the message, let alone if it is affirmatively concealed from them. The political accountability of the officials with control is insufficient, in other words, just because those officials are allowed to use their control (and in fact are deliberately using it) to conceal their role from the voters with the power to hold them accountable.

Johanns, 544 U.S. at 578 (footnote omitted). *Accord Pleasant Grove City*, 129 S.Ct. at 1141 ("the government should lose when the character of the speech is at issue and its governmental nature has not been made clear . . . ") (Souter, J., concurring in the judgment); Cf. *Johanns*, 544 U.S. at 569 ("I resist ranking the promotional messages funded under the Beef Promotion and Research Act of 1985, . . . but not attributed to the Government, as government speech, given the message the Government conveys in its own name.") (Ginsburg, J., concurring in the judgment).

Similarly, several circuit courts of appeal have held that a critical factor in determining whether speech is "government speech" insulated from First

Amendment scrutiny is whether a reasonable observer would understand that government controlled the message. *See, e.g., Roach v. Stouffer,* 560 F.3d 860, 867 (8th Cir. 2009) (rejecting contention that license plate statement is government speech, and "join[ing] the Fourth, Seventh, and Ninth Circuits in concluding that a reasonable and fully informed observer would consider the speaker to be the organization that sponsors and the vehicle owner who displays the specialty license plate."); *Planned Parenthood v. Rose*, 361 F.3d 786, 794 (4th Cir. 2004) ("the literal speaker of the Choose Life message on the specialty plate therefore appears to be the vehicle owner").[3]

Legal scholars have expressed support for Justice Souter's suggested approach to assertions of government speech immunity when the circumstances are such that government's authorship is unclear. They have advocated adoption of a rule requiring Government to bear the burden of clearly identifying itself as the speaker if it wishes to enjoy the benefit of removing its expression from First Amendment constraints

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[3] Inexplicably, although the Ninth Circuit adopted a four-factor test for determining whether speech is government speech or private speech in *Arizona Life Coalition v. Stanton*, 515 F.3d 956 (9th Cir.), *cert. denied*, 129 S.Ct. 56 (2008), the majority opinion below never mentioned the *Stanton* test and made no effort to apply it. The third factor of the *Stanton* test is to determine who is "the literal speaker." *Id.* at 964. It is undisputed in this case that Northlake Marine Works is "the literal speaker" in the BMP plan since its name appears throughout the plan and the City's name never appears.

by invoking the government speech doctrine. Recognizing "that government speech is most valuable and least dangerous when its governmental source is apparent," one scholar advocates the rule "that a public entity seeking to claim the government speech defense must establish that the contested expression is governmental in origin both formally (i.e., that the government expressly claimed the speech as its own when it authorized the communication) and functionally (i.e., that onlookers understand the speech to be the government's at the time of its delivery)." Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U.L.Rev. 587, 589 (2008). *Accord* Comment, *First Amendment Values at Serious Risk: The Government Speech Doctrine After Johanns v. Livestock Marketing Ass'n,* 55 Cath. U.L. Rev. 795, 799 (2006) ("if government wishes to invoke the government speech doctrine, it must ensure that listeners understand that the government itself is the speaker"). *See also* R. Bezanson & W. Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1377, 1510 (2001).

In a case involving a compelled government *subsidy* of government speech, Justice Souter raised the question of whether the First Amendment permits "government deception by omission (or by misleading statement)" as to the identity of the speaker when government controls expression "that is not ostensibly government" and yet is government controlled. *Johanns,* 544 U.S. at 580. This case provides the perfect vehicle for resolving this important issue

in the context of a compelled *speech* case, where a private citizen has been compelled to disseminate government's message on his own property, in a form that does not identify government as the speaker.

V. The Decision Below Conflicts With this Court's Decisions in *Consolidated Edison* and in Several Other Cases, by Allowing Government to Decide What Topics Are "Relevant" Enough for a Citizen to Discuss.

In this case the City prohibited any discussion of its own role in polluting the waters of Lake Union on the grounds that this subject was not "relevant" to the purpose of a BMP plan. App. 24. By permitting the City to decide what subjects are relevant for public discussion, the decision below conflicts with *Consolidated Edison*, *supra* and several other decisions of this Court. In *Consolidated Edison*, the State of New York precluded the discussion of any "controversial issues" such as whether the generation of electricity by means of nuclear power plants was a good idea. This Court held that the prohibition of this subject area was unconstitutional because "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Consolidated Edison,* 447 U.S. at 537-38. Similar subject restrictions have been struck down by this Court. *See*, *e.g.*, *Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972) (governments are not allowed to choose "which issues are worth discussing or debating . . . ");

FCC v. League of Women's Voters, 468 U.S. 364, 384 (1984) (ban on all editorializing violated First Amendment because it was not content neutral); *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 513-14 (1981) ("the city may not choose the appropriate subjects for public discourse . . . ").

Moreover, the City admitted that it vetoed Strickland's sentence about the City's practice of dumping raw sewage and storm water run off into Lake Union because that message, if it proved to be accurate, could subject the City to civil liability. App. 13. Thus, the City acknowledged that it was engaging in viewpoint discrimination by suppressing a particular viewpoint simply because it did not like the message that was being conveyed.

By allowing the City to censor this anti-City viewpoint, the decision below conflicts with a plethora of this Court's decisions which hold that viewpoint discrimination by Government violates the First Amendment. *See, e.g.*, *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995) ("When government targets not subject matter but particular views by speakers on a subject, the violation of the First Amendment is all the more blatant."); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (A regulation must not be "an effort to suppress expression merely because public officials oppose the speaker's view."); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("[T]he First Amendment forbids

government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.").

VI. The Decision Below Conflicts With this Court's Long Line of Decisions Which Hold that Government May Not Justify Content Discrimination by Showing that the Speaker Has Other Alternative Means of Communicating His Message.

The majority opinion below concludes that it was permissible to condition issuance of a land use permit on Strickland's agreement to surrender his First Amendment right to speak critically about his city government. Once Strickland agreed to take out the offending sentence, the City gave him the land use permit he had applied for. Notwithstanding that this Court has frequently held that "government may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech," *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 210 (2003) (ellipsis and internal quotation marks omitted), the majority opinion reasons that this was constitutionally permissible because Strickland had other avenues by which he could communicate with his marina tenants. App. 4.

Judge Ikuta was correct when she opined in her dissent that this Court has "consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have

alternative means of expression." App. 7, quoting *Consolidated Edison*, 447 U.S. at 541 n.10.

CONCLUSION

For the reasons stated above, petitioners ask this Court to grant a writ of certiorari to review the decision entered below.

DATED this 16th day of February, 2011.

Respectfully submitted,

JAMES E. LOBSENZ*
*Counsel of Record
KATHERINE A. GEORGE
Attorneys for Petitioners

APPENDIX A

NOT FOR PUBLICATION [August 31, 2010]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ED STRICKLAND and NORTHLAKE MARINE WORKS, a Washington corporation, Plaintiffs-Appellants, v. CITY OF SEATTLE, Defendant-Appellee.	No. 09-35890 D.C. No. 2:08-cv-00454-RSM MEMORANDUM* (Filed Sep. 2, 2010)

Appeal from the United States District Court
for the Western District of Washington
Ricardo S. Martinez, District Judge, Presiding

Argued and Submitted June 10, 2010
Seattle, Washington

Before: CANBY, CALLAHAN and IKUTA, Circuit Judges.

Ed Strickland, the owner of Northlake Marine Works, appeals the district court's grant of summary judgment to the City of Seattle ("the City") on his claim that the City violated his First Amendment

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

rights.[1] Strickland alleges that the City unconstitutionally compelled him to speak and to associate himself with the City's "message" when it required him to distribute to his tenants a Best Management Practices Plan ("BMP Plan") in order to obtain a permit to modify the structure of the marina. He also alleges that the City engaged in content and viewpoint discrimination when it refused to approve a version of the BMP Plan that accused the City of dumping sewage into Lake Union.

We review the grant or denial of summary judgment de novo, *Gossett v. Czech,* 581 F.3d 891, 893 (9th Cir. 2009), and we may affirm on any ground supported by the record. *United States v. Dunifer,* 219 F.3d 1004, 1006 (9th Cir. 2000).

The City's requirement that permit applicants draft and disseminate plans setting forth practices which marina tenants must follow to keep the marina free of pollutants does not abridge Strickland's First Amendment rights. *Cf. Envtl. Def. Ctr. v. United States,* 344 F.3d 832, 848-49 (9th Cir. 2003). The BMP plan does not "dictate a specific message." *Id.* at 849. Moreover, the City's requirement that such a plan be disseminated to the marina tenants is legitimate and consistent with the regulatory goals of the Washington Shoreline Management Act of 1971 and the City's shoreline master program, neither of which Strickland challenges as unconstitutional. Accordingly, we

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[1] Appellants are referred to collectively as "Strickland."

find Strickland's compelled speech claims unpersuasive.

We also find unpersuasive Strickland's arguments that City unconstitutionally required "its message," as conveyed in the BMP plan, to be attributed to him. Again, the plan does not convey a "specific message," as it simply sets forth requirements that marina tenants are advised to follow in order to keep the marina free of pollutants. Strickland has not shown that the City would have disapproved a version of the BMP plan that explained its dissemination was required by the City and otherwise disclaimed attribution.

Finally, we conclude that Strickland's censorship claim fails for two reasons. First, to the extent that the City-approved BMP plan conveys the City's endorsement of specific practices, it is government speech and "exempt from First Amendment scrutiny." *Johanns v. Livestock Mktg. Ass'n,* 544 U.S. 550, 553 (2005). *See also Pleasant Grove City v. Summum,* 129 S. Ct. 1125, 1131 (2009) (noting that "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech").

Second, to the extent that Strickland asserts a private-speech censorship claim, it fails because he has not shown that the City, has, in fact, restricted what he may say or may not say to his tenants. *Cf. Consol. Edison Co. v. Pub. Serv. Corp.,* 447 U.S. 530, 532-33 (1980) (finding unconstitutional a rule

promulgated by a public utilities commission which prohibited public utility companies from including with their monthly bills documents that discussed controversial issues of public policy). Moreover, unlike the "envelope space" in *Consolidated Edison,* the BMP plan is not a modality for private speech. Rather, both parties agree that the BMP plan must undergo government approval, and that the City has a duty to "sign off" on BMP plans that are submitted as part of a permit application. This is part and parcel of the City's duty to ensure compliance with, and to further the goals of, Washington's Shoreline Management Act. *See* RCW §§ 90.58.080, 90.58.200. Accordingly, the City's duty to approve BMP plans in the course of the permitting process reflects an element of governmental responsibility for the "speech" that was not present in *Consolidated Edison.*

In light of such responsibility, the City's interest in refusing to put its imprimatur on any plan that contains information that is not relevant to the permit requirements is substantial, and Strickland has not shown that the City otherwise seeks to limit his ability to convey whatever message he wishes to his tenants when disseminating the BMP Plan. Indeed, the City concedes that he could handwrite his messages onto the version he disseminates or even staple a cover sheet to the BMP plan setting forth his

view of the permitting process and any other matter he wishes to discuss.[2]

Because the City has not engaged in any official action that restricts what Strickland may say in conveying the BMP plan to his tenants, we conclude that there has been no actionable government restriction on his speech, and that, therefore, Strickland cannot maintain a First Amendment claim for content or viewpoint discrimination.

AFFIRMED.

Strickland v. City of Seattle, No. 09-35890

IKUTA, J., dissenting.

The central question raised by this appeal is whether the City can deny Strickland a development permit solely because the City does not like the

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[2] Strickland contends that the existence of "other places or means of communication are irrelevant" to the First Amendment analysis, but none of the cases he cites for that proposition apply here, as each case either involves the limitation of speech in a public forum or regulations aimed at restricting particular speech. *Cf. Schneider v. State*, 308 U.S. 147, 163 (1939); *Reno v. ACLU*, 521 U.S. 844 (1997); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 75 (1983); *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 556 (1975); *Thornhill v. Alabama*, 310 U.S. 88, 105 (1940). The parties agree that the permit application is not a public forum and the City's duty to review and approve BMP plans in issuing construction permits is not aimed at restricting speech. Indeed, expressive speech is irrelevant to the permit application.

political commentary that Strickland included in his BMP plan.

According to the Supreme Court, the answer to this question is no. In *Consolidated Edison Co. v. Public Service Commission (Con Ed)*, New York City told Con Ed, a regulated utility, that it could not include political statements in its official billing envelope. 447 U.S. 530, 532 (1980). The Court struck down New York's order because it was content-based censorship, *id.* at 537, that could not withstand strict scrutiny, and therefore violated Con Ed's First Amendment rights, *id.* at 544.

According to the majority, the City's censorship passes constitutional muster in this case because the City's control over the content of the BMP plan makes it "government speech" that can be regulated without First Amendment scrutiny. But Strickland is the author of the BMP plan, not the City, and a government agency cannot "restrict the free expression of a private party" unless the agency owns the property where the speech is made or is speaking itself, regardless of how much regulatory control the agency has over the private party's actions. *See Con Ed,* 447 U.S. at 539-40 & n 1; *Downs v. L.A. Unified Sch. Dist.,* 228 F.3d 1003, 1013 (9th Cir. 2000). Thus, the majority's reliance on *Johanns v. Livestock Mktg. Ass'n,* 544 U.S. 550, 553 (2005) and *Pleasant Grove City v. Summum,* 129 S.Ct. 1125, 1133 (2009), which involved direct government speech and control over government property, respectively, is to no avail.

The majority also claims that Strickland's censorship claim fails because Strickland could express his political views in a different way. Maj. Op. at 4-5. But the Supreme Court has "consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression." *Con Ed,* 447 U.S. at 541 n.10.

It is well established that "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech." *United States v. Am. Library Ass'n, Inc.,* 539 U.S. 194, 210 (2003) (ellipsis and internal quotation marks omitted). In direct contradiction to this principle, the City denied Strickland a development permit until he agreed to curtail his First Amendment rights and remove his political commentary from the BMP plan. Therefore, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ED STRICKLAND and NORTHLAKE MARINE WORKS, a Washington Corporation, Plaintiffs, v. CITY OF SEATTLE, *et al.*, Defendants.	CASE NO. C08-0454 RSM ORDER DENYING PLAINTFFS' [sic] MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' REMAINING FIRST AMENDMENT CLAIM

I. INTRODUCTION

This matter comes before the Court on the parties' cross motions for summary judgment on Plaintiffs' remaining first amendment claim (Dkt. #21, Dkt. #24). Plaintiffs Northlake Marine Works and its owner Ed Strickland claim that the City of Seattle ("the City") violated their first amendment rights to free speech by compelling Strickland to create a Best Management Practices ("BMP") plan with which he did not agree and by preventing him from including in it a political statement accusing the City of dumping millions of gallons of sewage into Lake Union. The City contends that its requirement was permissible compulsion of private speech pursuant to a regulatory regime, and in the alternative, that the BMP plan

was government speech not subject to first amendment scrutiny. The parties agree on all material facts.

For the reasons set forth below, the Court agrees with Defendant that the BMP plan was government speech, DENIES Plaintiffs' motion for summary judgment and GRANTS Defendant's motion for summary judgment.

II. DISCUSSION

A. Background

Because the parties have settled all claims except Plaintiffs' first amendment claim, only the facts relevant to that claim are summarized here. Ed Strickland is the owner of Northlake Marine Works, a marina on Lake Union in Seattle, Washington. In August of 2003, he applied for a Master Use Permit from the City to reconfigure his marina's pier. The City's Department of Planning and Development ("DPD") approved an early stage of the permit process and imposed multiple conditions with which Strickland would have to comply to get his Master User Permit and final building permit. One of these conditions stated:

> "A Best Management Practices Plan for Marina Tenants shall be prepared and submitted to DPD. The plan shall include BMPs that will reduce and minimize the impacts of recreational boat storage in the aquatic environment. The system by which tenants are informed of the contents of the plan shall

> be included with this plan. This plan shall be added to the final plan set prior to final approval."

(Strickland Declaration, Exhibit 1 at 10).

Although the condition above only says that a BMP plan "shall be prepared and submitted," in practice the City has final approval authority over everything that goes in the BMP plan. As is true in this case, the City makes changes to the BMP or requires the applicant to make changes until the City is satisfied. BMPs are typically distributed to tenants by the marina. The City files a copy of the approved BMP plan in the "final plan set," the set of records associated with the building permit.

To comply with the BMP condition, in June 2005 Strickland sent a proposed BMP plan to the DPD through his consultant, Alan Foltz. Margaret Glowacki, The City's Land Use Planner who reviewed Strickland's BMP plan, found it to be defective in several ways. On December 9, 2005, she e-mailed Foltz and told him that she had received the BMPs for another marina, the Shilshole Bay Marina, and would like him to take "everything that is appropriate for Mr. Strickland's site and tenants" from the Shilshole BMPs and put it into Strickland's BMP plan. (Glowacki Declaration, Exhibit F). In clearing up an apparent confusion about the status of the BMP plan later that day, Glowacki informed Foltz that the BMPs he submitted "were not clear on a number of issues." (*Id.*). She told him th2at "[t]he

quickest way to resolve this issue is to use Shilshole's BMPs because it is clear and addresses water quality and the appropriate BMPs." (*Id.*).

Glowacki had obtained the Shilshole Bay Marina's BMP plan through her ownership of a sailboat at the Shilshole marina, not through her employment with the City. As it turns out, the Shilshole Bay Marina BMP plan was voluntary and had never been part of the City's approval process. This Shilshole Bay plan contained the following opening paragraph, which is the main contributor to the issues of this case:

> "The Port of Seattle and Shilshole Bay Marina are committed to preserving and enhancing the environment through proper management of all activities that occur at this facility. Given this commitment and in accordance with the Department of Ecology rules, United States Coast Guard regulations, and the Federal Clean Water Act, we have established these Best Management Practices in the hope that they will ensure the continued safekeeping of our harbor and marine environment. Marina staff are available to assist customers 24 hours/day, 7 days/week. Shilshole Bay Marina has been named an 'EnviroStar Business,' earning the highest five-star rating for preventing pollution and reducing hazardous waste."

(Glowacki Delcaration [sic], Exhibit E at 1).

Strickland, already frustrated with the City for the delay in handling his application and for other reasons, misunderstood Glowacki's instructions. He thought that Glowacki wanted him to incorporate this opening paragraph into his BMP plan and change references to "The Port of Seattle" to "The City of Seattle." He rewrote the paragraph making that substitution and substituting "Lake Union" for the harbor. Then, to get his tenants' attention and tell them about what Strickland believed to be a serious problem, Strickland appended to the end of the paragraph the sentence, "This is in contrast to the City practice of dumping billions of gallons of sewage and storm water run off [sic] into Lake Union." (Strickland Declaration, Exhibit 8 at 1). Strickland's proposed opening paragraph then read:

> "The City of Seattle is committed to preserving and enhancing the environment through proper management of all activities that occur at this facility. Given this commitment and in accordance with the Department of Ecology rules, United States Coast Guard regulations, and the Federal Clean Water Act, the City have established these Best Management Practices in the hope that they will ensure the continued safekeeping of Lake Union. *This is in contrast to the City practice of dumping billions of gallons of sewage and storm water run off into Lake Union.*"

(*Id.* (emphasis added)).

Glowacki objected to this paragraph for two reasons. First, she noted that it did not make sense as written because the "City of Seattle" could not exercise "proper management" of the marina because the City was not the manager. Second, she objected to the sentence concerning the sewage runoff because she did not know whether it was true and because she thought it might subject the City to liability. Glowacki decided to revise the paragraph. She e-mailed Foltz and stated:

> "I will revise it to read:
>
> The Northlake Marina is committed to preserving and enhancing the environment through proper management of all activities that occur at this facility. Given this commitment and in accordance with the Department of Ecology rules, United States Coast Guard regulations, and the Federal Clean Water Act, the Northlake Marina has established these Best Management Practices in the hope that they will ensure the continued safekeeping of Lake Union."

(Strickland Declaration, Exhibit 9 at 1).

Strickland did not want to remove his political statement regarding sewer runoff. For many months, he and the City were at an impasse. Eventually, Strickland filed a BMP plan including the substantive management practices from the Shilshole BMPs, but with no opening paragraph and therefore no political statement. The city approved that BMP plan and eventually issued Strickland a building permit.

Strickland later filed suit claiming that the City violated his first amendment right to free speech when it refused to allow him to include his political statement regarding the City's sewer runoff into the BMP plan.

B. Standard of Review

Summary judgment is appropriate where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. Proc. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The parties agree upon the material facts in this case and each argues that it is entitled to judgment as a matter of law.

C. Compelled Speech

Strickland first argues that the City violated his first amendment right by compelling him to "disseminate the City's message." He cites a long line of Supreme Court cases which hold that it violates the first amendment for the government to compel a private citizen to speak a message with which he disagrees. *See Hurley v. Irish-American Gay, Lesbian and Bi-sexual Group of Boston*, 515 U.S. 557 (1995); *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988); *Pac. Gas and Electric Co. v. Pub. Utils. Comm'n of California*, 475 U.S. 1 (1986); *Wooley v. Maynard*, 430 U.S. 705

(1977); *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974). For example, in *Wooley,* the constitutionality of a New Hampshire statute requiring that the state's motto, "Live Free or Die," be displayed on all state license plates was challenged on first amendment grounds. The plaintiff, Wooley, objected to the requirement that he display the state's motto because he felt it conflicted with his religious, moral, and political beliefs. The Court held that the government cannot force individuals to "use their private property as 'mobile billboards' for the State's ideological message." *Wooley,* 430 U.S. 705 at 715. Here, Strickland argues that by compelling him to create a BMP plan and distribute it to his tenants and at the same time controlling the contents of the BMP plan, the City is effectively putting words in his mouth in the same way that New Hampshire forced Wooley to speak its motto.

The City first argues that its BMP requirement is authorized by the Ninth Circuit's decision in *Environmental Defense Center, Inc. v. U.S. Environmental Protection Agency,* 344 F.3d 832 (9th 2003). In that case, the Ninth Circuit upheld an EPA requirement that small municipal sewers distribute educational materials to the community concerning the impacts of stormwater discharges into water bodies. Central to its holding that the requirement did not violate the compelled speech doctrine was that the EPA's distribution requirement was "broad," did not "dictate a specific message," and did not require any "specific speech at all." *Envtl. Defense Center,* 344 F.3d 832 at

849. The present case, however, is distinguishable because the City exercises full approval authority over the BMPs and thus can require specific speech, or as here, require that specific speech be removed. Therefore, *Environmental Defense Center* is inapplicable.

The City's second argument is more persuasive. It argues that because the City has full control of the contents of the BMPs through its final approval authority, the BMPs constitute government speech rather than private speech and are therefore not subject to the first amendment. *See Johanns v. Livestock Marketing Assn.*, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny."); *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000) (A government entity has the right to "speak for itself").

In *Pleasant Grove City v. Summum*, the Court held that when a city denied a request by a private organization to put a donated monument in a public park that contained other privately donated monuments, it did not violate the organization's first amendment rights because monuments in a public park are government speech. 129 S.Ct. 1125 (2009). The Court explained that even though the monuments were designed and built by private citizens, the city "'effectively controlled' the messages sent by the monuments in the Park by exercising 'final approval authority' over their selection." *Id.* at 1134 (quoting *Johanns*, 544 U.S. 550 at 560-61).

In *Johanns,* a collection of "high-end" beef producers challenged a federal statute requiring them to pay assessments that were then used to finance advertising for generic beef. The Court held that the advertisements were government speech even though the Operating Committee that designed the ads was a nongovernmental entity. It explained, "When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages." *Johanns,* 544 U.S. 550 at 562.

These decisions control the present case.[1] Although the City solicited Strickland's help in providing BMPs specific to his marina, every word of the BMP plan had to be approved by the City. When Strickland tried to add even one sentence to the BMP plan that the City did not approve of, the City rejected it. Strickland cannot claim that the BMP plan was his own private speech when the government had complete control over its contents.

Strickland argues that even if the ultimate message is the City's, he is unconstitutionally being

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[1] The Ninth Circuit has adopted a non-exhaustive four-factor test to distinguish between private speech and government speech. Because the decision in this case is compelled by *Summum* and *Johanns,* the court does not apply the four-factor test here. However, were the court to apply the test, the outcome would be the same.

forced to associate with that message. Importantly, the Court in *Johanns* noted that there may have been, "on some set of facts," an as-applied challenge to the beef advertisements if the advertisements were attributed to the plaintiffs, and declined to express an opinion on the matter. *Id.* at 565. Justice Thomas, concurring in the judgment, stated:

> "The government may not, consistent with the First Amendment, associate individuals or organizations involuntarily with speech by attributing an unwanted message to them, whether or not those individuals fund the speech, and whether or not the message is under the government's control. This principle follows not only from our cases establishing that the government may not compel individuals to convey messages with which they disagree, but also from our expressive-association cases, which prohibit the government from coercively associating individuals or groups with unwanted messages."

Id. at 568 (Thomas, J., concurring) (citations omitted).

Along the lines of Justice Thomas's reasoning, it seems clear that if the City forced the final BMP plan to be attributed to Strickland, that would violate the first amendment. To hold otherwise would lead to the illogical result that a government exercising some censorship over private speech violates the first amendment, while a government exercising comprehensive and total censorship escapes first amendment

scrutiny altogether by transforming private speech into government speech.

But that is not what happened here. Strickland argues that the BMP is attributed to him because it says "Northlake Marine Works Best Management Practices" on every page and does not say anywhere on its face that the government approved it. However, this does not establish attribution; the title tells the reader to which marina the best practices apply, not who is responsible for writing them. More importantly, there is no evidence indicating that Strickland could not have dispelled any notion that he might be associated with the City's BMP plan, perhaps by including a statement in the plan that its contents were subject to the City's approval and regulations. Thus, to the extent there is any ambiguity about who is responsible for the BMP that might lead somebody to attribute it to Strickland, that attribution was not *compelled* by the city and was completely avoidable. At one point, Glowacki revised Strickland's BMP plan to say that "Northlake Marina has established these best practices. . . ." But this attribution was not compelled, since the record clearly demonstrates that Strickland's final approved BMP, which contained no opening paragraph at all, did not contain this language.

Strickland also argues that he was forced to associate with the City's message by distributing the BMP to his tenants. But simply delivering a government regulatory document to tenants does not imply association with its contents. Moreover, the record

indicates that Strickland was not compelled to deliver the BMP to his tenants himself but merely was required to propose a way to inform his tenants of the plan.

As a practical matter, most people who submit BMPs to the City do not mind attribution to them or association with them because they agree with the contents of the final approved version since both the City and marina owners have an interest in preserving the quality of water bodies.[2] But to the extent a marina owner disagrees with the City's message, there is no indication that the City compels attribution or association. Because the evidence does not indicate that the City compelled Strickland to associate himself with the BMP plan, the City did not violate Strickland's first amendment rights.

D. Content and Viewpoint Discrimination

Strickland argues that the City exercised content and viewpoint discrimination in violation of the first amendment by not allowing him to include in the BMP a sentence stating that the City was a major polluter of Lake Union. Because the BMP is government speech and not Strickland's private speech, as explained above, the City can choose to include or not

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[2] *See, Envtl. Def. Ctr.*, 344 F.3d 832, 850 (noting that it is "fair to presume" that regulated municipal sewers "will agree with the central message of a public safety alert encouraging proper disposal of toxic materials.").

include whatever it wants. The government can "speak for itself." *Southworth,* 529 U.S. 217, 229.

III. CONCLUSION

Having reviewed the relevant pleadings, the declarations and exhibits attached thereto, and the remainder of the record, the Court hereby finds and ORDERS:

(1) Plaintiffs' Motion for Summary Judgment on the Remaining Free Speech Claims (Dkt. #21) is DENIED.

(2) Defendant's Motion for Summary Judgment on the Remaining Free Speech Claims (Dkt. #24) is GRANTED.

(3) The Clerk is directed to forward a copy of this Order to all counsel of record.

DATED this 9th day of September, 2009.

/s/ R S Martinez
RICARDO S. MARTINEZ
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ED STRICKLAND and NORTHLAKE MARINE WORKS, a Washington corporation, Plaintiffs-Appellants, v. CITY OF SEATTLE, Defendant-Appellee.	No. 09-35890 D.C. No. 2:08-cv-00454-RSM Western District of Washington, Seattle ORDER (Filed Nov. 19, 2010)

Before: CANBY, CALLAHAN and IKUTA, Circuit Judges.

Judge Canby and Judge Callahan vote to deny the petition for panel rehearing. Judge Ikuta votes to grant the petition for panel rehearing. Judge Callahan votes to deny the petition for rehearing en banc, and Judge Canby recommends the denial of the petition for rehearing en banc. Judge Ikuta votes to grant the petition for rehearing en banc. The petition for en banc rehearing has been circulated to the full court, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

ED STRICKLAND and NORTHLAKE MARINE WORKS, a Washington corporation, Plaintiffs,	)	
vs.	)	C08-0454
CITY OF SEATTLE, DIANE M. SUGIMURA in her official and individual capacity, and MARGARET GLOWACKI in her official and individual capacity, Defendants.	)	RSM

DEPOSITION UPON ORAL EXAMINATION
OF MARGARET GLOWACKI

APPEARANCES:

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MAY 27, 2009

CARRIE J. DEHUFF, RPR, CSR
GROSHONG – QUAINTANCE COURT REPORTING
SEATTLE 838-1282 * TACOMA 627-7129

* * *

[GLOWACKI BY LOBSENZ]

[81] about Mr. Strickland wanting the sentence in about City dumps stuff into the lakes?

A. Basically it was a pretty quick conversation. Andy and Cliff and I sat down together, so the conversation happened . . .

Q. Jointly?

A. Jointly. And, I mean I'm probably the one that – Well, I knew that there – that Mr. Strickland wanted to leave that in, and I didn't see that as relevant nor accurate. So, I brought that to Andy and Cliff's attention. And they said, yeah, that shouldn't being [sic] in the document.

* * *

RECORD
AND
BRIEFS

No. 10-1044

Supreme Court, U.S.
FILED
MAY 19 2011
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ED STRICKLAND AND NORTHLAKE MARINE WORKS, a Washington corporation,

Petitioners,

v.

CITY OF SEATTLE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENT CITY OF SEATTLE

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QUESTION PRESENTED

A local government, as a condition on the issuance of a permit for the expansion of a commercial marina, required the marina owner to convey to his tenants a list of best management practices ("BMPs") intended to reduce water pollution. The owner drafted for government review a "BMP plan," consisting of the BMPs as well as the means through which the tenants would be informed of them. With that background, the issue presented is as follows:

Has any First Amendment violation occurred where: (a) the BMPs consisted of non-ideological pollution prevention measures with which the marina owner agreed; (b) the owner's ability to convey any additional opinions or statements to his tenants was unrestricted; (c) the government never precluded the owner from attributing the BMPs to the government; and (d) the government retained final approval authority over the BMP plan to ensure that it advanced the government's anti-pollution goals, and incorporated the approved plan into its regulatory files?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 4

I. THIS CASE IS A POOR VEHICLE FOR EXPLORING THE CLAIMED FIRST AMENDMENT ISSUES 4

A. The City has not restricted Strickland's speech 4

B. Even if the required BMPs conveyed a specific message, Strickland supports it 5

C. The City has not hampered Strickland's ability to attribute the BMPs to the City 7

D. This fact-bound case presents no important question for review 8

II. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR PRESENT AN OPPORTUNITY TO EXPLORE QUESTIONS LEFT OPEN BY *JOHANNS* 9

A. This case creates no tension with, and indeed is supported by, *Pleasant Grove* 9

B. The decision below presents no opportunity to explore questions raised by *Johanns* 11

TABLE OF CONTENTS – Continued

Page

C. *Wooley* is not on point 13

D. Strickland's reliance on *Consolidated Edison*, like that of the dissenting judge below, is misplaced 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980) 15, 16

Greer v. Spock, 424 U.S. 828 (1976) 16

Johanns v. Livestock Marketing Assn., 544 U.S. 550 (2005) 9, 11, 12, 13

Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) 16

Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2009) 9, 10, 11

Wooley v. Maynard, 430 U.S. 705 (1977) 13, 14

RULES

9th Cir. R. 36-3 8

STATEMENT OF THE CASE

Petitioner Ed Strickland is the owner of Petitioner Northlake Marine Works, a marina on Lake Union in the City of Seattle, Washington (the "City"). Strickland applied for a land use permit from the City to reconfigure his existing pier to accommodate larger boats.

In 2004, the City issued a decision finding that the proposed development was consistent with Washington and City shoreline protection regulations. However, the City's approval of the actual permit was subject to Strickland fulfilling a number of conditions. Condition No. 4 required Strickland to submit a best management practices plan ("BMP plan") to the City. The purpose of the BMP plan was to detail best management practices ("BMPs") that marina tenants should employ to reduce harmful impacts on the aquatic environment, and to describe how Strickland would convey that information to his tenants. Strickland did not contest the requirement that he submit a BMP plan.

Strickland made three attempts to submit a draft BMP plan. Margaret Glowacki, a City employee charged with reviewing the BMP plan, rejected Strickland's first draft because, among other things, it failed to specify how Strickland would inform his tenants of the BMPs in the plan. Glowacki suggested that Strickland use as a model the BMPs distributed to tenants at the Shilshole Bay Marina ("Shilshole"), which is operated by the Port of Seattle (an entity

distinct from the City). Glowacki had obtained those BMPs through her ownership of a boat at Shilshole, not through her employment with the City. App. 11.[1] Glowacki advised Strickland: "The quickest way to resolve this issue is to use Shilshole's BMPs [document] because it is clear and addresses water quality and the appropriate BMPs."

In response, Strickland submitted a second draft BMP plan, based on the Shilshole model. Unfortunately, "Strickland, already frustrated with the City . . . , misunderstood Glowacki's instructions." App. 12. The Shilshole document contained a boilerplate opening paragraph addressing the Port of Seattle's "proper management" of its marina. App. 11. Strickland, incorrectly thinking that Glowacki wanted him to incorporate that paragraph, substituted "City" for "Port." App. 12. He also appended a new sentence to the end of the paragraph: "This is in contrast to the City practice of dumping billions of gallons of sewage and storm water run off into Lake Union." *Id.*

Glowacki objected to this paragraph for two reasons. First, the paragraph did not make sense because the "City of Seattle" was not the marina manager and

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[1] Strickland persists in incorrectly characterizing the Shilshole document as a BMP *plan* "which had been submitted to the City" (Petition at 3), an assertion disproved by the record. The Shilshole BMPs were not a City-required "BMP plan"; as the district court correctly noted, the Shilshole document "was voluntary and had never been part of the City's approval process." App. 11.

thus could not exercise "proper management" of Strickland's marina. App. 13. Second, she did not know whether the sentence concerning the sewage runoff was true, and she thought it might subject the City to liability. *Id.*

Glowacki offered to approve the second draft BMP plan if Strickland substituted "Northlake Marina" for the references to the City in the introductory paragraph, and deleted the new final sentence. *Id.* After Strickland objected, Glowacki informed Strickland that the City had decided to delete the opening paragraph from the BMP plan altogether because it was irrelevant, and that the draft plan otherwise fulfilled Condition No. 4. Glowacki stressed that Strickland was free to distribute the deleted paragraph to his tenants, in addition to the required BMPs. Strickland, however, objected to this as well. *Id.*

Strickland then submitted a third draft BMP plan, based on the first draft but with the initial deficiencies corrected and without the opening paragraph. The City approved this plan and issued the requested permit. *Id.*

The approved BMP plan was placed on file with the City along with the other documents that memorialize the regulatory conditions applicable to Strickland's permit approval. At all times relevant to this dispute, Strickland had neither completed his project nor distributed the required BMPs to his tenants.

Strickland sued, claiming that the City had violated his First Amendment right to free speech. The district court and the court of appeals rejected Strickland's claims. Strickland then filed his timely Petition.

REASONS FOR DENYING THE PETITION

I. THIS CASE IS A POOR VEHICLE FOR EXPLORING THE CLAIMED FIRST AMENDMENT ISSUES.

This case presents a poor vehicle for considering the First Amendment issues that Strickland claims his Petition presents. In fact, the record does not present those issues. Moreover, the unusual nature of the dispute between Strickland and the City makes this case too fact-bound to be of interest beyond the parties.

A. The City has not restricted Strickland's speech.

The court of appeals rejected Strickland's speech-censorship claim by correctly concluding that Strickland "has not shown that the City has, in fact, restricted what he may say or may not say to his tenants." App. 3. Strickland is free to say whatever he wants, however he wants, to whomever he wants, whenever he wants.

Through its BMP plan requirement, the City requires Strickland to convey certain information (in the form of BMPs) to his marina tenants. There is no evidence that the City has objected to him conveying whatever he wants to his tenants in addition to the BMPs, even if that additional information is within the same document containing the BMPs. Indeed, Glowacki specifically told Strickland that the City was not restricting his right to convey opinions to his tenants, and the City has repeatedly told Strickland that it has no interest in limiting what he says to anyone.

The only divisive issue in this case relates to the extraneous text that Strickland insists on including in the approved BMP plan – a City regulatory document that memorializes the BMPs Strickland is required to convey to his tenants as a condition of a permit. The City has no interest in encumbering its regulatory files with such extraneous text, but Strickland is free to convey it and any other non-required text he desires. On these facts, there is no restriction of speech that would warrant this Court's review, making this case a poor vehicle for addressing such issues.

B. Even if the required BMPs conveyed a specific message, Strickland supports it.

Strickland also contends that the City is forcing him to align himself with the specific message

conveyed by the BMPs, but there is no evidence that the BMPs contain any particular message. Instead, the BMPs include such uncontroversial pollution-prevention tips as "Oily bilge water should not be discharged to surface waters" and "All waste oil and other solvents, paints, and antifreeze are to be removed from the property immediately when they are of no use." The court of appeals therefore correctly concluded that "the plan does not convey a 'specific message,' as it simply sets forth requirements that marina tenants are advised to follow in order to keep the marina free of pollutants." App. 3.

To the extent the BMPs convey any message, it is one Strickland emphatically supports. Throughout the proceedings below, Strickland explained that he objected to the City changing or removing the opening paragraph from his second draft BMP plan precisely because Strickland thought the paragraph would "increase[] the chances that his tenants would want to prevent further pollution in Lake Union. . . ."

Notwithstanding a lengthy record of professed agreement with the spirit and substance of the BMPs, Strickland now reverses course and claims for the first time that the BMPs convey a "specific message" with which he professes to disagree: that recreational boaters, rather than the City, are the biggest contributors of pollution to the lake. Petition at 16. This new claim cannot be squared with the plain language of the BMPs, which do not state or suggest in any way that boaters are the biggest contributors of pollution; the BMPs are merely based on the premise that

recreational boaters can be a source of pollution if they do not follow BMPs. For this reason too, this case is a poor vehicle for addressing First Amendment issues.

C. The City has not hampered Strickland's ability to attribute the BMPs to the City.

Strickland contends that the City limited his ability to attribute the BMPs to the City. The record does not support that assertion. There is no evidence that Strickland ever asked to attribute the BMPs to the City or that the City ever told him he could not make that attribution. As the court of appeals correctly found, "Strickland has not shown that the City would have disapproved a version of the BMP plan that explained its dissemination was required by the City and otherwise disclaimed attribution." App. 3.

There is also no factual basis for Strickland accusing the City of "rewriting the proposed [BMP] plan so as to identify it as the 'Northlake Marine Works Best Management Practices Plan.'" Petition at 12. Strickland prepared each of the three draft BMP plans and was free to attribute the BMPs to the City using the title of the document had he chosen to do so.[2] In this respect as well, there is no First

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[2] The titles of Strickland's three drafts attributed each one, respectively, to "Northlake Marine Works," "Northlake Marina,"

(Continued on following page)

Amendment issue that would warrant or require this Court's review.

D. This fact-bound case presents no important question for review.

The Petition makes no attempt to demonstrate that this case presents an important issue meriting this Court's review. This case, in truth, is not important because it is limited to the unusual dispute between Strickland and the City, stemming from Strickland's insistence on using a BMP plan located in a government file as a platform from which to advance a political or ideological message. It is difficult to see that situation arising in other contexts. Furthermore, the court of appeals declined to publish its decision, thus limiting the decision's precedential value and confirming that this case does not present any significant issues that merit further review. App. 1; *accord* 9th Cir. R. 36-3.

* * *

In sum, Strickland asserts three claims – that the City has limited his free expression, compelled him to deliver a message with which he disagrees, and hampered his ability to attribute the BMPs to the City – that are unsupported and contradicted by the record, and that present no issue of importance for

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and "Waterfront Construction, Inc.," the last of which was an evident error that Strickland corrected without objection.

anyone beyond the parties. As such, this case is an exceptionally poor vehicle for addressing the First Amendment issues Strickland asserts. For this reason alone, the Court should deny the Petition.

II. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR PRESENT AN OPPORTUNITY TO EXPLORE QUESTIONS LEFT OPEN BY *JOHANNS*.

Strickland argues that the decision below either conflicts with decisions of this Court or presents an opportunity to explore questions this Court has left open. Strickland is incorrect. There is no conflict between the court of appeals' decision and the decisions of this Court. In fact, to the extent the decisions invoked by Strickland are relevant, they support the court of appeals' decision.

A. This case creates no tension with, and indeed is supported by, *Pleasant Grove*.

In briefing before both courts below, Strickland argued that this case "is obviously nothing like" *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009). Nevertheless, Strickland now claims that the court of appeals' decision conflicts with *Pleasant Grove*. Petition at 13-15.

Strickland was right the first time: this case is distinguishable from *Pleasant Grove* and thus creates no tension with that opinion. In *Pleasant Grove*, this

Court determined that placement of a Ten Commandments monument in a public park was government speech because the state spoke through its selection of the monument to occupy the limited park space. 129 S. Ct. at 1131.

Strickland can find no foundation in *Pleasant Grove* for some "right as a landowner to remain silent, and *not* to speak on its own land, because it does not wish to disseminate the message in question."[3] Petition at 15. Because *Pleasant Grove* was limited to the specific context of permanent monuments donated to governments, it does not address the rights of private landowners like Strickland. The court of appeals therefore did not rest its decision on *Pleasant Grove*; it merely cited *Pleasant Grove* for the limited proposition that "government speech" is exempt from First Amendment scrutiny. App. 3.

To the extent an analogy can be drawn between *Pleasant Grove* and this case, that analogy supports the decision below. The only place the City limited Strickland's speech was in the approved BMP plan, which the City retains in its regulatory files. Like permanent monuments that may be erected in public parks only with government permission, the BMP plan cannot become part of the City's regulatory files

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[3] Even though Strickland omits a "right not to speak" from his Questions Presented, he invokes such a right in his argument. As the City detailed in briefing below, any attempt by Strickland to claim a right to remain silent (and to resist distributing *any* BMPs to his tenants) is time-barred.

without City approval. Both the park monument and the City-approved BMP plan are unmistakably government speech.

The conclusion that no First Amendment violation occurred is even stronger in this case because Strickland and the City agree that the City's regulatory files do not constitute a public forum, whereas the park at issue in *Pleasant Grove* was a traditional public forum, where individual speech has traditionally been accorded some deference. *See* App. 5 n.2. Thus, far from establishing a reason to review the court of appeals' decision, *Pleasant Grove* shows that no such review is warranted.

B. The decision below presents no opportunity to explore questions raised by *Johanns*.

Strickland argues that this Court should grant review to explore questions left open by *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005). This case does not present those questions. To the extent *Johanns* is relevant, it supports the court of appeals' decision.

In *Johanns*, beef producers challenged, on First Amendment grounds, a statutory requirement that they help fund a beef promotional campaign featuring a message with which they disagreed. This Court rejected the challenge, reasoning that the promotions were government speech not subject to First Amendment review because of the "degree of governmental

control over the message." *Id.* at 561. The government "set out the overarching message and some of its elements, . . . left the development of the remaining details to an entity whose members are answerable" to the government, and "exercise[d] final approval authority over every word used in every promotional campaign." *Id.* Strickland incorrectly casts his case as an opportunity to explore matters involving compelled speech without attribution that were not addressed in *Johanns*. This case does not present a useful vehicle for addressing those issues. There is no evidence in the record that the City ever compelled Strickland to disseminate statements with which he disagreed without attributing them to the City. Thus, Strickland's invocation of Justice Thomas's and Justice Souter's concerns about compelled speech without attribution is not on point. *See* Petition at 11-12 (quoting *Johanns*, 544 U.S. at 568 (Thomas, J., concurring)); *id.* at 18-19 (quoting *Johanns*, 544 U.S. at 578 (Souter, J., dissenting)).

To the extent *Johanns* is instructive here, it supports the decision below. The degree of governmental control over the message – which formed the core of the "government speech" holding in *Johanns* – is as pronounced in this case as it was in *Johanns*. Although Strickland was free to propose his own BMP text, it could not become part of his required BMP plan (and thus part of the message he was compelled to deliver to his tenants) without approval by a City representative who assessed the text's

capacity to advance the City's environmental regulatory program.

Indeed, under *Johanns*, the existence of that regulatory program provides an alternative ground for affirming the decision below. *Johanns* noted that this Court had allowed the compelled subsidy of speech where it was germane to a broader regulatory scheme. *Johanns*, 544 U.S. at 558-59. The same must be true for actual compelled speech. Here, as the court of appeals found, compelling Strickland to disseminate BMPs to his tenants "is legitimate and consistent with the regulatory goals of [Washington and City environmental protection statutes], neither of which Strickland challenges as unconstitutional." App. 2. Because of those regulatory goals, "the City's interest in refusing to put its imprimatur on any plan that contains information that is not relevant to the permit requirements is substantial. . . ." App. 4.

In short, this Court's opinion in *Johanns* does nothing to support the Petition. To the contrary, *Johanns* supports the court of appeals' analysis and confirms that no conflict that would warrant further review exists.

C. *Wooley* is not on point.

Strickland argued below that the City unconstitutionally required the government's message to be attributed to him. App. 3. The court of appeals rejected that argument on factual grounds, noting that Strickland has not shown that the City would have objected

if Strickland had proposed a BMP plan that attributed the BMPs to the City. *Id.*

Strickland now insists that this holding conflicts with *Wooley v. Maynard*, 430 U.S. 705 (1977). There is no conflict. In *Wooley*, this Court ruled that New Hampshire may not constitutionally enforce criminal sanctions against persons who cover the motto "Live Free or Die" on vehicle license plates. The Court never analyzed to whom the message was attributable; the Court simply assumed that the motto on the license plate was "the *State's* ideological message." *Id.* at 715 (emphasis added). It therefore makes no sense for Strickland to cite *Wooley* in challenging the court of appeals' rejection of his forced attribution argument.

Wooley is inapposite for a more fundamental reason: in ruling against New Hampshire, this Court repeatedly limited its rationale to the compelled public display of ideological messages with which the speaker disagrees. *See, e.g., id.* at 713, 715, 717. By contrast, there is no evidence that Strickland objects to such non-ideological messages as "Oily bilge water should not be discharged to surface waters." Far from finding these messages repugnant, Strickland agrees with them and with the ultimate goal of preventing pollution of the lake. *Wooley* therefore presents no conflict that would warrant this Court's review.

D. Strickland's reliance on *Consolidated Edison*, like that of the dissenting judge below, is misplaced.

Echoing the dissent in the decision below, Strickland asserts that "[b]y permitting the City to decide what subjects are relevant for public discussion," the decision below conflicts with *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980), and "a plethora of this Court's decisions which hold that viewpoint discrimination by Government violates the First Amendment." Petition at 22-23; *accord* App. 6 (Ikuta, J., dissenting). Strickland further suggests that the decision below violates *Consolidated Edison* because the decision justifies the discrimination by assuming that an alternative forum exists for the expression. Strickland is wrong on both counts. As such, no conflict exists with *Consolidated Edison*.

Consolidated Edison presented an actual instance of speech censorship: a utility regulatory commission "barred utility companies from including bill inserts that express 'their opinions or viewpoints on controversial issues of public policy.'" 447 U.S. at 533 (citation omitted). The City, by contrast, has not barred Strickland from saying anything to anyone.

Furthermore, this Court based its decision in *Consolidated Edison* on its determination that the billing envelope where the utility company placed the insert was a medium within the exclusive control of the company. The Court noted that content-based

limitations on speech had been upheld in other cases involving public facilities. *See id.* at 538-39 (discussing *Greer v. Spock*, 424 U.S. 828 (1976), and *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)). It distinguished those decisions because "Consolidated Edison has not asked to use the offices of the Commission as a forum from which to promulgate its views." *Id.* at 539-40.

In this case, by contrast, the BMP plan (the only place where the City has exerted control over any text) is an instrumentality of the government and required for government regulatory purposes. As the court of appeals correctly noted, the BMP plan is "not a modality for private speech." App. 4. Unlike the plaintiff in *Consolidated Edison*, Strickland *is* asking to use government instrumentalities for his own purposes. Thus, Strickland's reliance on *Consolidated Edison*, like that of the dissent below, is misplaced. Properly applied to the facts at issue, *Consolidated Edison* provides strong support for the City's conduct. As with the other decisions of this Court cited by Strickland, there is no conflict with *Consolidated Edison* that warrants this Court's review.

CONCLUSION

The City respectfully asks this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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RECORD AND BRIEFS

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In The
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ED STRICKLAND and
NORTHLAKE MARINE WORKS,
a Washington corporation,

Petitioners,

v.

CITY OF SEATTLE,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
A. ARGUMENT IN REPLY	1
1. THE CITY OF SEATTLE MISCHARACTERIZES THE UNDISPUTED FACTS CONCERNING THE COMPELLED PRIVATE SPEECH AT ISSUE	1
2. THE CITY'S CONTENTION THAT SPEECH ABOUT POLLUTION PREVENTION CAN BE COMPELLED BECAUSE IT IS NOT "IDEOLOGICAL" CONFLICTS WITH THIS COURT'S FREE SPEECH JURISPRUDENCE	5
3. THE CONTENTION THAT ONLY A "SPECIFIC MESSAGE" TRIGGERS THE FIRST AMENDMENT CONFLICTS WITH *HURLEY*	6
4. THE CITY FAILS TO RECOGNIZE THIS COURT HAS CONSISTENTLY PUT THE BURDEN OF PROOF ON GOVERNMENT TO JUSTIFY CONTENT-BASED SPEECH RESTRICTIONS	7
5. THIS CASE PRESENTS INCREASINGLY COMMON ISSUES	10
B. CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES

City of Abilene v. EPA, 325 F.3d 657 (5th Cir. 2003) 4

Environmental Defense Center v. EPA, 344 F.3d 832 (9th Cir. 2003) 4

Freedman v. State of Maryland, 380 U.S. 51 (1965) 8, 9

Hurley v. Irish American Gay, Lesbian and Bi-Sexual Group, 515 U.S. 557 (1995) 6

Illinois ex rel. Madigan v. Telemarketing Associates, 538 U.S. 600 (2003) 9

Pacific Gas & Electric Co. v. Public Utilities Commission of Cal., 475 U.S. 1 (1986) 7

Riley v. National Federation of the Blind, 487 U.S. 781 (1988) 1, 5

Speiser v. Randall, 357 U.S. 513 (1958) 9

United States v. Playboy Entertainment Group, 529 U.S. 803 (2000) 8, 9

Wooley v. Maynard, 430 U.S. 705 (1977) 5

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

R. Bezanson & W. Buss, *The Many Faces of Government Speech*, 86 L. Rev. 1377, 1380 (2001) 10

A. ARGUMENT IN REPLY

1. THE CITY OF SEATTLE MISCHARACTERIZES THE UNDISPUTED FACTS CONCERNING THE COMPELLED PRIVATE SPEECH AT ISSUE.

The City of Seattle argues that Ed Strickland was free to say whatever he wanted to his marina tenants. *Brief in Opposition to Certiorari*, at 4-5. The undisputed facts show, on the contrary, that the City told him "both what to say and what *not* to say," to borrow the words of *Riley v. National Federation of the Blind*, 487 U.S. 781, 797 (1988) (emphasis in original).

a. Strickland's speech was restrained.

The City does not deny that it withheld approval of Strickland's marina project solely because he refused to remove a political statement – highlighting the City's role in water pollution – from a "best management practices" (BMP) plan which the City required him to write for his marina tenants. App. 13. Thus, it is not true that Strickland could speak freely: the City imposed a speech restraint as a condition of his project permit.

b. Strickland was prevented from attributing the compelled speech to the City.

The record shows that Strickland tried to attribute the marina BMP plan to the City, which would

have indicated to readers that the plan was government speech and not private speech. App. 12. But the City required him to identify his private marina as the speaker instead. App. 13. Where Strickland had written that the "**City** [has] established these Best Management Practices," a City employee rewrote the plan to say that "**Northlake Marina** established these Best Management Practices." App. 12-13 (bold added). Thus, the City mischaracterizes the undisputed facts by asserting that "[t]here is no evidence that Strickland ever asked to attribute the BMPs to the City or that the City ever told him he could not make that attribution." *Brief in Opposition to Certiorari*, at 7.

c. Strickland always said he disagreed with the censored message.

The City erroneously suggests that Strickland is changing his tune by asserting "for the first time" in this Court that he disagrees with the message of the BMP plan approved by the City. *Brief in Opposition to Certiorari*, at 6. In fact, Strickland discussed his disagreement from the outset. He explained in the District Court that merely describing ways to prevent pollution, without alerting tenants that Lake Union was already seriously polluted due to City sewage-dumping, would not sufficiently convey the importance of following the prescribed best practices:

> I wrote the statement about the City's sewage dumping ("the Political Statement") based on my awareness that Lake Union was severely polluted by the City's "combined

sewer overflow" problem. I had read newspaper articles describing the problem and, as a marina owner, I had directly observed it. It was my understanding and belief that whenever it rained heavily in Seattle, the City's sewers were overwhelmed, causing pipes that normally discharge only stormwater to release a combination of stormwater and raw sewage. As a result of this overflow problem, untreated sewage containing bacteria and toxins entered Lake Union. As a marina owner, and as a former science teacher, I was greatly concerned about the environmental harms caused by the City's sewer overflows. I knew from news reports that sewage dumping was the biggest source of water pollution in Seattle.

I included the Political Statement in the introductory paragraph to my proposed BMP plan because I thought it would get my tenants' attention and increase their motivation to take pollution prevention seriously, and also because I thought all people in Seattle should be aware of the sewer overflow problem so that they would support the necessary reforms.

. . . I did not want to make my political statement separately from the BMP plan, as [City employee Margaret] Glowacki had suggested. I felt that my BMP plan needed to have a compelling opening paragraph in order to get the attention of my marina tenants. **After all, the plan would not work if nobody wanted to read it.** Also, I felt

> that my tenants should know about the problems caused by the City, to increase their motivation to follow best practices and to help explain why best practices were needed. Besides, I have a First Amendment right to political speech, and I wanted to exercise that right.

Ninth Cir. Excerpts of Record, at 58-60 (Strickland Dec., ¶16, 17, 22) (bold added). Similarly on appeal he argued that he:

> felt strongly that his BMP plan should have a compelling opening paragraph. ER 59, ¶22. He felt that, without one, the plan might fail to get the attention of his moorage tenants, in which case its pollution prevention purpose would be defeated.

Appellant's Opening Brief, at 8, 12. In sum, contrary to City assertions, Strickland made clear from the outset that he disagreed with the message of the censored BMP plan, because it would not be effective without describing the serious pollution already caused by the City.[1]

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[1] The City claimed it censored the statement about sewage-dumping in part because the plan reviewer did not know if it was true. App. 13. Not only was the City's sewage problem well publicized, as noted above, but Circuit Courts have recognized that storm sewers are the biggest source of water pollution. *Appellant's Reply Brief*, at 24-25, quoting *Environmental Defense Center v. EPA*, 344 F.3d 832, 840-41 (9th Cir. 2003) ("Stormwater runoff is one of the most significant sources of water pollution in the nation") and *City of Abilene v. EPA*, 325 F.3d 657, 659 (5th Cir. 2003).

2. THE CITY'S CONTENTION THAT SPEECH ABOUT POLLUTION PREVENTION CAN BE COMPELLED BECAUSE IT IS NOT "IDEOLOGICAL" CONFLICTS WITH THIS COURT'S FREE SPEECH JURISPRUDENCE.

Pointing to language in *Wooley v. Maynard*, 430 U.S. 705 (1977), the City contends that this Court struck down New Hampshire's compelled display of the license-plate motto "Live Free or Die" on the sole basis that it was an "ideological message" that the citizen motorist disagreed with. *Brief in Opposition*, at 14. But this Court has flatly rejected the City's contention that First Amendment protection against compelled speech is limited to "ideological" messages. For example, in *Riley*, 487 U.S. at 797, this Court said that the prohibition on compelled speech applies to "compelled statements of fact," and not only to "compelled statements of opinion." In *Riley*, this Court struck down a North Carolina regulation requiring professional fundraisers to disclose to potential donors the percentage of collected donations actually turned over to charity in the prior year. *Id.* at 798. Such forced disclosures had nothing to do with ideology, yet were unconstitutional, contrary to the City's arguments.

Even if the City was correct that the First Amendment protection against compelled speech applies only to political or ideological statements, the compelled speech in this case would still be unlawful. By requiring Strickland to tell his marina tenants how to

prevent pollution, without permitting him to explain that the City is the biggest polluter of Lake Union, the City effectively made a political statement that boaters rather than city sewers are the real problem and that its own practices are not worthy of attention.

3. THE CONTENTION THAT ONLY A "SPECIFIC MESSAGE" TRIGGERS THE FIRST AMENDMENT CONFLICTS WITH *HURLEY*.

The City's contention that the First Amendment affords Strickland no protection unless the BMPs contained some "specific message" that he did not want to be associated with is in direct conflict with this Court's holding in *Hurley v. Irish American Gay, Lesbian and Bi-Sexual Group*, 515 U.S. 557 (1995). There, this Court held that "a narrow, succinctly articulable message is ***not*** a condition of constitutional protection, which, if confined to expressions conveying a 'particularized message' [citation] would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." *Hurley* at 569 (emphasis added).

The City emphasizes that Strickland did not object to the particular practices prescribed in the BMP plan, as if that means he endorsed the overall message. *Brief in Opposition*, at 14. It means no such thing, as explained above. Moreover, under the City's reasoning, if a citizen cares about global warming but disagrees with the government about its cause, the government could compel the citizen to disseminate

its message as to what it believes is the major cause of global warming simply because the citizen "agrees with . . . the ultimate goal of preventing" global warming. *Brief in Opposition*, at 14. There is no authority for such a proposition.

4. THE CITY FAILS TO RECOGNIZE THIS COURT HAS CONSISTENTLY PUT THE BURDEN OF PROOF ON GOVERNMENT TO JUSTIFY CONTENT-BASED SPEECH RESTRICTIONS.

The Court below ruled that "there is no evidence indicating that Strickland could not have dispelled any notion that he might be associated with the City's BMP plan, perhaps by including a statement in the plan that its contents were subject to the City's approval and regulations." App. 19. The City argues that this ruling was correct, and claims that Strickland's First Amendment claim was properly rejected "because Strickland has not shown that the City would have objected if Strickland had proposed a BMP plan that attributed the BMP's to the City." *Brief in Opposition*, at 13-14.

As an initial matter, the suggestion that use of a disclaimer would solve any constitutional compelled-speech problem is of doubtful validity. It conflicts with the decision in *Pacific Gas & Electric Co. v. Public Utilities Commission of Cal.*, 475 U.S. 1, 15 n.11 (1986), where this Court held that the presence of a disclaimer – stating that the utility was not

endorsing the message it was required to disseminate – would *not* render it permissible to compel speech which the utility disagreed with.

Second, as explained above, the City deleted the reference to the City as the author of the BMP plan, and substituted the name of Strickland's marina. Thus, as a factual matter Strickland *did* show that the City had refused to allow him to attribute the BMP plan to the City.

Third, and most significantly, the City's contention that Strickland should bear the burden of proof flies in the face of this Court's precedents regarding the allocation of the burden of proof in First Amendment speech cases. Here, the City prohibited Strickland from identifying the City as a major polluter of Lake Union and also prohibited him from identifying the City as the author of the BMP. This Court has consistently held that the burden of proof is on Government to justify such content-based restrictions on speech:

> When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed. 'Content-based restrictions are presumptively invalid, *R.A.V. v. St. Paul*, 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), and the Government bears the burden to rebut that presumption.'

United States v. Playboy Entertainment Group, 529 U.S. 803, 817 (2000). *Accord Freedman v. State of*

Maryland, 380 U.S. 51, 58 (1965) ("The burden of proving that[the expression] is unprotected must rest on the censor."); *Illinois ex rel. Madigan v. Telemarketing Associates*, 538 U.S. 600, 620 n.9 (2003) ("The Court has long cautioned that, to avoid chilling protected speech, the government must bear the burden of proving that the speech it seeks to prohibit is unprotected."); *Speiser v. Randall*, 357 U.S. 513, 528-529 (1958) (holding unconstitutional a law that required a taxpayer seeking a tax exemption to carry the burden of proof to demonstrate that his speech does not contain advocacy of criminal acts).

The majority opinion from the Court below conflicts with all of these precedents by holding that it was up to Strickland to prove that, if he had made a *second* attempt to persuade the City to let him attribute the BMP plan to the City, the City would not have acceded to that request. Not only is it practically impossible to prove what *would have* happened if a citizen had asserted his rights more forcefully, an inherently speculative venture, the majority's reasoning flips on its head the presumption that content-based restrictions are invalid and shifts the duty of protecting First Amendment rights from the government to the citizen. This is a dangerously wrong direction in conflict with this Court's precedents. *Playboy Entertainment Group*, 529 U.S. at 817; *Freedman*, 380 U.S. at 58.

5. THIS CASE PRESENTS INCREASINGLY COMMON ISSUES.

The City argues that this case is too unusual and "fact-bound" to merit this Court's attention. *Brief in Opposition*, at 4, 8. But as scholars have noted, "the roles occupied by government when it speaks are vastly multiplied in the modern state." R. Bezanson & W. Buss, *The Many Faces of Government Speech*, 86 L. Rev. 1377, 1380 (2001). "[T]he use of speech by government is expanding and taking new forms," including "employing devices to conceal hidden government messages in private speech." *Id.* Contrary to the City's arguments, in this case where the government not only compelled private speech but refused to identify itself as the author and censored a statement critical of itself, it is hard to imagine a set of facts more conducive to clarifying the extent of government immunity from the First Amendment.

B. CONCLUSION

For the reasons stated above and in his petition, Ed Strickland asks this Court to grant a writ of certiorari to review the decision entered below.

DATED this 27th day of May, 2011.

Respectfully submitted,

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